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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RICK ENGEBRETSEN, Plaintiff and Respondent, v. CITY OF SAN DIEGO, Defendant; RADOSLAV KALLA et al., Real Parties in Interest and Appellants.	D068438 (Super. Ct. No. 37-2015-00017734-CU-WM-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joel M. Pressman, Judge. Affirmed.

Sharif Faust Lawyers, Matthew J. Faust for Real Parties in Interest and Appellants.

Finch, Thornton and Baird, David S. Demian, for Plaintiff and Respondent.

No appearance by Defendant.

Plaintiff Rick Engebretsen sought a writ of mandate to compel the City of San Diego (City) to recognize him as the sole applicant for a conditional use permit (CUP) to operate a medical marijuana consumer cooperative (MMCC) on his property (the Property) and process the application accordingly. Engebretsen alleged he was the sole record owner and interest holder of the Property throughout the application process. Although real party in interest Radoslav Kalla was listed as the applicant for the CUP, Engebretsen alleged that Kalla was acting on Engebretsen's behalf as an agent, Kalla never had an independent legal right to use the Property, and Engebretsen had since revoked Kalla's agency. The City did not oppose Engebretsen's writ petition.

The trial court granted the writ, and in a statement of decision, discussed its basis for finding that (1) Kalla was acting as Engebretsen's agent in pursuing the CUP; (2) Kalla did not have any independent authority to pursue it or legal interest in the Property; (3) Engebretsen, as the principal, terminated Kalla's agency and became the only proper applicant; and (4) the City had a ministerial duty to process the application in Engebretsen's name.

On appeal, Kalla and real party in interest Matthew Compton contend the trial court's principal-agent finding is not supported by sufficient evidence, mandamus was not a proper remedy, and the court did not address and consider their equitable estoppel defense in the statement of decision. We conclude substantial evidence supports the court's factual finding of an agency relationship, Engebretsen established a proper basis for a writ of mandate, and the court implicitly rejected Kalla and Compton's estoppel defense. Therefore, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Engebretsen's Property and the Initial Application for a CUP to Operate an MMCC

Engebretsen's Property, on Carroll Road in San Diego, is located in a City district where up to four properties within the district may be used to operate medical marijuana consumer cooperatives. Engebretsen was the sole record owner of the Property in fee simple. In early 2014, Engebretsen retained Paul Britvar to submit an application on Engebretsen's behalf for a CUP to operate an MMCC and seek out prospective parties to lease or purchase the Property. The scope of Engebretsen and Britvar's principal-agent relationship is well documented and undisputed in this case.

The Land Development Code (LDC), within the San Diego Municipal Code (SDMC), governs the City's CUP application process and sets forth the individuals who are authorized to file an application. (SDMC, § 112.0102.) On an initial CUP application form, Britvar certified he was the "Authorized Agent of Property Owner." On a required ownership disclosure form, he listed Engebretsen as the sole owner and interest holder in the Property. Compton, as vice president of Bay Front LLC, signed a separate form naming the company as the financially responsible party to cover the City's costs in processing the application.

Engebretsen Authorizes Kalla to Continue the CUP Application Process

Up until August 2014, Kalla and Compton were dealing with Britvar over lease and/or purchase negotiations, but Kalla and Compton wished to negotiate directly with Engebretsen. Engebretsen began communicating primarily with Kalla. Thereafter, Engebretsen terminated Britvar's agency and orally authorized Kalla as his agent to

continue the CUP application process while they attempted to negotiate a lease or purchase agreement for the Property. In October 2014, unknown to Engebretsen, Britvar assigned his "interest" in the CUP application to Kalla.

On October 23, 2014, Kalla filed a revised application form with the City for the CUP to operate an MMCC on the Property (the Application). As Britvar had done, Kalla marked himself as the "Authorized Agent of Property Owner" in the "Applicant" box on the Application; Engebretsen is listed on the same form as the "Property Owner." Kalla signed the Application and certified the correctness of the supplied information. Kalla did not indicate he was a property owner, tenant, or "other person having a legal right, interest, or entitlement to the use of the property that is the subject of this application." With the Application, Kalla also filed an updated ownership disclosure form signed by Engebretsen, again showing Engebretsen as the sole owner and interest holder in the Property.

Between November 2014 and February 2015, Kalla and Engebretsen negotiated directly with each other on possible terms for the lease or purchase of the Property. Engebretsen sent Kalla a letter of intent for the lease of the Property (First LOI). The First LOI provides: "Tenant agrees to pay for all costs and fees related to obtaining the CUP." Further, the First LOI states: "Lease Agreement shall be contingent upon

Landlord obtaining CUP and Tenant obtaining any other governmental permits and licenses required for Tenant's Use."[1] Kalla did not sign the First LOI.

In response to the First LOI, Kalla provided Engebretsen with a letter of intent for a lease and purchase option (Second LOI). Kalla's Second LOI states: "Lease Agreement shall be contingent upon Tenant on behalf of Landlord obtaining CUP and Tenant obtaining any other governmental permits and licenses required for Tenant's Use." Engebretsen did not sign the Second LOI. The parties continued to exchange multiple letters of intent and proposed leases in good faith, but could not reach an agreement. In general, Engebretsen preferred to structure the deal as a lease while Kalla and Compton preferred an outright purchase/sale.

Engebretsen Revokes Kalla's Agency, and the City Refuses to Process the Application in Engebretsen's Name

Because negotiations with Kalla reached an impasse, Engebretsen contacted the City in March 2015 to be recognized as the sole applicant on the Application. The City responded that it did not consider Engebretsen to be the applicant. Engebretsen next met with a City representative to discuss removing Kalla's name from the Application, but the City refused. Subsequently, Engebretsen repeatedly met or communicated with City representatives, including through his counsel, to convey that he was the sole owner and interest holder in the Property, he had terminated Kalla's agency, Kalla had no independent legal right to pursue the Application, and Engebretsen would be the

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1 Within the exchanged documents, the "Landlord" or "Seller" is defined as Engebretsen and the "Tenant" or "Buyer" is defined as Kalla, Compton, and/or a company under their control.

financially responsible party. The City continuously refused to follow Engebretsen's instructions.

In April 2015, the City informed Engebretsen that Compton had designated Kalla as the new financially responsible party for the Application, against Engebretsen's wishes. The City would not accept Engebretsen as the financially responsible party for the Application without Kalla's signature. Later that month, the City's hearing officer approved the Application for issuance of a CUP, with Kalla listed as the applicant and prospective permit holder. The Application was the fourth and last one approved by the City for a CUP to operate an MMCC in the district where the Property is located. A third party appealed the Application approval decision for unrelated reasons, and the hearing on that appeal was set to be heard by the City's Planning Commission on June 25, 2015.

Engebretsen's Petition for Writ of Mandate

In May 2015, Engebretsen filed a verified petition for writ of mandate directing the City to: (1) recognize Engebretsen as the sole applicant on the Application and (2) process the Application with Engebretsen as the sole applicant. The court set the matter for trial on an expedited basis. The City filed a statement of nonopposition to Engebretsen's petition for writ of mandate.

On June 16, 2015, the court conducted a trial and heard testimony from Kalla and Compton. Kalla testified he and Compton "believed [they] had a lease contract on the property" based on Britvar's representations, but admitted that negotiations with Engebretsen "fell completely apart" and the parties never actually executed a lease agreement. Compton confirmed he and Kalla had no lease agreement on the Property

and they agreed to be financially responsible for the Application because they thought they "were going to be able to lease" the Property. The City took no position at trial.

After closing argument, the court gave its tentative ruling from the bench, granting Engebretsen's petition for a writ of mandate. As part of the ruling, Engebretsen would have to pay the City the amounts Kalla and Compton had paid for the Application's processing, so the City could then reimburse Kalla and Compton. In making its ruling, the court noted the undisputed facts that Engebretsen was the record owner of the Property and Kalla and Compton did not enter into a lease or purchase agreement for the Property. The court commented that Kalla and Compton had not shown they had "any interest in [the] property whatsoever," and had "moved forward absent a legally binding agreement under any circumstances." Kalla and Compton requested a statement of decision on several disputed issues, and the court directed counsel for Engebretsen to draft a proposed statement. Following the trial, the court issued a minute order summarizing its ruling.

On June 23, 2015, Kalla and Compton filed a notice of appeal. The next day, the court ordered that the notice of appeal would not operate as a stay of execution on the judgment and writ to be issued.

On July 20, 2015, the court filed its statement of decision (SOD). Kalla and Compton did not object to the SOD, propose any revisions, or otherwise inform the trial court that the SOD failed to address an issue. On August 18, 2015, the court rendered its

judgment, which attached and incorporated the SOD by reference, and issued the writ of mandate.[2]

DISCUSSION

I. *Standard of Review*

When an appellate court reviews a trial court's judgment on a petition for a writ of mandate, it applies the substantial evidence test to the trial court's findings of fact and independently reviews the trial court's conclusions on questions of law, which include the interpretation of a statute and its application to the facts. (*Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 995 (*Klajic*).) The substantial evidence test applies to both express and implied findings of fact. (*Rey Sanchez Investments v. Superior Court* (2016) 244 Cal.App.4th 259, 262.) " 'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) When reviewing the trial court's factual findings, we ask whether it was "reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Id.* at p. 652.)

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2 We denied Kalla and Compton's request for judicial notice dated February 19, 2016, of a separate lawsuit filed by Engebretsen against them. Accordingly, that matter is not part of the record on appeal.

II. *The Trial Court Properly Issued a Writ of Mandate*

Kalla and Compton contest the court's finding of an agency relationship, the propriety of mandamus relief, and the court's implied rejection of their equitable estoppel defense.

A. *The Court's Finding Regarding the Existence of an Agency Relationship Is Supported by Substantial Evidence*

Kalla and Compton argue insufficient evidence supported the trial court's factual finding that Kalla acted as Engebretsen's agent in pursuing a CUP application and the court placed undue weight on the application form submitted by Kalla to the City.

"An agent is one who represents another, called the principal, in dealings with third persons." (Civ. Code, § 2295.) "Any person may be authorized to act as an agent, including an adverse party to a transaction." (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1579.) Agency may be implied from the circumstances and conduct of the parties. (*Ibid.*) Indicia of an agency relationship include the agent's power to alter legal relations between the principal and others and the principal's right to control the agent's conduct. (*Vallely Investments, L.P. v. BancAmerica Commercial Corp.* (2001) 88 Cal.App.4th 816, 826.) "The existence of an agency relationship is a factual question for the trier of fact whose determination must be affirmed on appeal if supported by substantial evidence." (*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 965 (*Garlock*).)

Here, substantial evidence supports the court's finding that Kalla was acting as Engebretsen's agent in completing the Application. Kalla certified on the Application

form that he was Engebretsen's authorized agent, thereby representing and binding Engebretsen in dealings with the City regarding the CUP application. Kalla had no other basis or authority to complete a CUP application for the Property—he was neither a property owner nor a legal interest holder. In addition, Engebretsen declared under penalty of perjury that he orally authorized Kalla as his agent to continue the application process initiated by agent Britvar. Other evidence suggests that Kalla understood the CUP was for Engebretsen's benefit as the Property owner until Kalla executed a lease or purchase agreement. Furthermore, Engebretsen consistently believed he was able to terminate Kalla's agency with respect to the Application at any time, as a principal is entitled to do. (See *Malloy v. Fong* (1951) 37 Cal.2d 356, 370 ["The power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities."].) Kalla and Compton essentially ask us on appeal to reweigh or draw alternative inferences from the evidence, which we may not do. (*Garlock, supra*, 148 Cal.App.4th at p. 966.) The court's agency finding was reasonable.

B. *Engebretsen Established a Proper Basis for Mandamus Relief*

Kalla and Compton contend that Engebretsen did not establish a basis for mandamus relief because the City did not have a ministerial duty to recognize Engebretsen as the applicant and Engebretsen possessed a plain, speedy, and adequate legal remedy.

1. *Writs of Mandate Generally*

Under Code of Civil Procedure section 1085, subdivision (a), the trial court may issue a writ of mandate "to any . . . person . . . to compel the performance of an act which

the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that . . . person."

"A traditional writ of mandate under Code of Civil Procedure section 1085 is a method for compelling a public entity to perform a legal and usually ministerial duty. [Citation.] The trial court reviews an administrative action pursuant to Code of Civil Procedure section 1085 to determine whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established public policy, unlawful, procedurally unfair, or whether the agency failed to follow the procedure and give the notices the law requires. [Citations.] 'Although mandate will not lie to control a public agency's discretion, that is to say, force the exercise of discretion in a particular manner, it will lie to correct abuses of discretion. [Citation.] In determining whether an agency has abused its discretion, the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld.' " (*Klajic, supra*, 90 Cal.App.4th at p. 995, fn. omitted; *California Public Records Research, Inc. v. County of Stanislaus* (2016) 246 Cal.App.4th 1432, 1443.)

2. *The City Had a Ministerial Duty*

Kalla and Compton argue the City did not have ministerial duty in this case because (1) there is no City procedure for amending a CUP application, (2) allowing amendments may allow "dangerous or untrustworthy" people to operate an MMCC, and

(3) a writ of prohibition was the appropriate remedy to stop the City from processing the Application in Kalla's name. We reject these arguments.

To obtain mandamus relief, Engebretsen was required to demonstrate that the City had a "clear, present, ministerial duty" to perform the requested action. (*Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 129.) "A ministerial duty is an act that a public officer is obligated to perform in a prescribed manner required by law when a given state of facts exists." (*Ibid*.) An act is not ministerial when it involves the exercise of discretion or judgment. (*County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 596.)

Courts have concluded that city and county employees are engaged in ministerial acts when ascertaining whether procedural requirements have been met. (E.g., *Billig v. Voges* (1990) 223 Cal.App.3d 962, 968-969 [clerk correctly rejected referendum petition because it did not comply with Elections Code]; *Palmer v. Fox* (1953) 118 Cal.App.2d 453, 455-456 [compelling county engineer to process building permit application where plaintiffs submitted all required paperwork]; see also *Shell Oil Co. v. City and County of San Francisco* (1983) 139 Cal.App.3d 917, 921 (*Shell Oil*) [compelling city to process a lessee's application for a conditional use permit because lessee was an "owner" under the city's relevant ordinance].)

In this case, Engebretsen showed that the City must process and issue applications for conditional use permits consistent with relevant laws and procedures.[3] (SDMC, § 112.0102, subds. (a) & (b).) The City's ordinances provide that the persons "deemed to have the authority to file an application [are]: [¶] (1) The *record owner* of the real property that is the subject of the permit, map, or other matter; [¶] (2) The property owner's authorized agent; or [¶] (3) Any other person who can demonstrate a legal right, interest, or entitlement to the use of the real property subject to the application." (SDMC, §§ 112.0102, subd. (a), 113.0103 [defining *applicant*].) The City's ordinances thus ensure that conditional use permits will only be granted to individuals having the right to use the property in the manner for which the permit is sought. (SDMC, §§ 112.0102, subd. (a), 113.0103; see *Shell Oil, supra*, 139 Cal.App.3d at p. 921; see generally 66A Cal.Jur.3d Zoning And Other Land Controls § 427 [summarizing California cases].) Any other interpretation would raise serious constitutional questions concerning property rights. (*Shell Oil*, at p. 921; see also *County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510 [holding that conditional use permits "run with the land"].)

Engebretsen demonstrated he was the only person who possessed the right to use the Property, Kalla never independently possessed such a right, Kalla was acting for Engebretsen's benefit in completing the Application (Civ. Code, § 2330), and

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3 "[A] conditional use permit grants an owner permission to devote a parcel to a use that the applicable zoning ordinance allows not as a matter of right but only upon issuance of the permit." (*Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1006.)

Engebretsen had terminated Kalla's agency. Under the circumstances, the City had a ministerial duty to process the CUP application for Engebretsen, the Property owner.

Regarding Kalla and Compton's remaining arguments, there is no evidence in the record that requiring the City to process the Application in Engebretsen's name would lead to dangerous MMCC operations.[4] Finally, Kalla and Compton have not cited any authority to support their position that a writ of prohibition was an available remedy. A writ of prohibition "arrests the proceedings of any tribunal, corporation, board, or person *exercising judicial functions*, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person." (Code Civ. Proc., § 1102, italics added.) A writ of prohibition may not restrain ministerial or nonjudicial acts, including an administrative decision to grant a permit. (*Whitten v. California State Board of Optometry* (1937) 8 Cal.2d 444, 445; *F.E. Booth Co. v. Zellerbach* (1929) 102 Cal.App. 686, 687.) The trial court did not err in concluding the City had a ministerial duty to process the Application in Engebretsen's name.

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4 As Engebretsen also points out, a different section of the SDMC requires background checks for people operating or working at an MMCC (SDMC, § 42.1507), which is unaffected by provisions of the LDC.

3. *Engebretsen Did Not Have an Adequate Legal Remedy*

Kalla and Compton next argue that Engebretsen possessed an adequate legal remedy of filing and/or pursuing a new CUP application, precluding mandamus relief.[5] This argument lacks merit.

A writ of mandate generally will not issue when the plaintiff possesses a "plain, speedy and adequate remedy in the ordinary course of law." (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 114.) Here, Engebretsen showed he did not possess such a remedy. The City refused to process the Application in Engebretsen's name, and it approved the Application with Kalla named as the prospective permit holder. Also, the City would not be issuing any more conditional use permits to operate MMCC's within the same city district. (SDMC, § 141.0614.) If the CUP was granted to Kalla, Engebretsen had no other immediate means to obtain a CUP for his Property from the City. Moreover, Engebretsen showed that the parties needed a determination in time to respond to an unrelated appeal of the City's decision to approve the Application. The court did not err in granting mandamus relief.

C. *The Court Did Not Commit Reversible Error in Connection with Kalla and Compton's Equitable Estoppel Defense*

At trial, Kalla and Compton opposed the issuance of a writ of mandate under a theory of equitable estoppel. Specifically, their counsel argued that Engebretsen was

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[5] Kalla and Compton also assign error to the trial court's omitting to address the issue of alternative legal remedies in its SOD. As we discuss, *infra*, they waived the argument by failing to object to the SOD or pointing out the alleged deficiency to the trial court. Regardless, any error was harmless because Engebretsen sufficiently stated a basis to obtain writ relief.

estopped from obtaining the CUP in his name because Kalla and Compton relied on Engebretsen's promises to sign a lease. Under Code of Civil Procedure section 632, Kalla and Compton requested a statement of decision on the court's "finding and reasoning as to the application of equitable estoppel" in the case.

The SOD did not explicitly address equitable estoppel, but instead sets forth in significant detail the factual background supporting the court's implicit rejection of the theory. Kalla and Compton did not object to the SOD below or argue it was deficient for failing to address an issue. On appeal, they contend the trial court erred in not addressing their equitable estoppel defense in its SOD and that the evidence supports their defense. We conclude they waived the argument regarding a deficient SOD and substantial evidence supports the court's implied rejection of their defense.

1. *Kalla and Compton Waived or Forfeited Their Claim Regarding the Court's Failure to Address Equitable Estoppel in the Statement of Decision*

In a court trial, "first, a party must request a statement of decision as to specific issues to obtain an explanation of the trial court's tentative decision (§ 632); second, if the court issues such a statement, a party claiming deficiencies therein must bring such defects to the trial court's attention to avoid implied findings on appeal favorable to the judgment (§ 634)." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1134 (*Arceneaux*).) Code of Civil Procedure section 634 "clearly refers to a party's need to point out deficiencies in the trial court's statement of decision as a condition of avoiding such implied findings, rather than merely to request such a statement initially as provided in section 632." (*Arceneaux*, at p. 1134.) "[I]f a party does not bring such deficiencies to

the trial court's attention, that party waives the right to claim on appeal that the statement was deficient in these regards, and hence the appellate court will imply findings to support the judgment." (*Id.* at pp. 1133-1134.)

Here, Kalla and Compton did not bring any alleged deficiencies in the SOD to the trial court's attention. If they had, the SOD could have been corrected and made part of the record on appeal. Accordingly, Kalla and Compton have waived or forfeited their argument relating to the court's alleged failure to address equitable estoppel, and we will imply all necessary findings to support the court's judgment. (*Agri-Systems, Inc. v. Foster Poultry Farms* (2008) 168 Cal.App.4th 1128, 1135.)

2. *The Court's Implied Rejection of Kalla and Compton's Equitable Estoppel Defense Is Supported by Substantial Evidence*

Substantial evidence supports the court's implied rejection of Kalla and Compton's equitable estoppel defense. (See *Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 970 ["the appellate court applies the doctrine of implied findings and presumes the trial court made all necessary findings supported by substantial evidence"].) " 'Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.' " (*Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 257 (*Golden Gate*).) The defense does not apply when even one element is missing. (*Ibid.*)

Here, it was virtually undisputed that the parties engaged in arm's-length, good faith negotiations for several months, but they simply could not reach a suitable lease or purchase agreement. The record supports that Kalla and Compton pursued the Application despite knowing they had not yet signed any agreement with Engebretsen, the Property owner. As a result, Kalla and Compton were not "ignorant of the true facts." (*Golden Gate, supra*, 165 Cal.App.4th at p. 259.) Similarly, Engebretsen only sought to be recognized as the sole applicant when he realized that the parties could not reach a mutually acceptable agreement. Consequently, Kalla and Compton failed to establish

that equitable estoppel prevented the City from recognizing Engebretsen as the CUP applicant.

DISPOSITION

The judgment is affirmed. Engebretsen shall recover his costs on appeal.

HALLER, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.